

**MINUTES OF THE  
WATER ISSUES TASK FORCE**

Thursday, November 2, 2006 – 9:00 a.m. – Room W125 House Building

**Members Present:**

Rep. David Ure, House Chair  
Sen. Patrice Arent  
Sen. Mike Dmitrich  
Rep. David N. Cox  
Rep. Margaret Dayton  
Rep. Ben C. Ferry  
Rep. James R. Gowans  
Rep. Michael T. Morley  
Rep. Patrick L. Painter

**Members Absent:**

Sen. Peter C. Knudson, Senate Chair  
Sen. Thomas V. Hatch  
Rep. Brad King

**Staff Present:**

Mr. J Brian Allred, Policy Analyst  
Mr. Mark Steinagel, Policy Analyst  
Mr. Chris Parker, Associate General Counsel  
Ms. Emily Brown, Associate General Counsel  
Ms. Joy Miller, Legislative Secretary

**Note:** A list of others present, a copy of related materials, and an audio recording of the meeting can be found at [www.le.utah.gov](http://www.le.utah.gov).

**1. Task Force Business**

Chair Ure called the meeting to order at 9:10 a.m. Sen. Knudson was excused from the meeting.

**MOTION:** Sen. Arent moved to approve the minutes of the October 11 and October 25, 2006 meetings. The motion passed unanimously.

Mr. Gary Kofford, Emery County Commissioner, thanked the Task Force for the opportunity to discuss problems regarding interbasin transfers within Emery County.

Mr. Jay Mark Humphrey, Emery Water Conservancy District, discussed interruption of surface and groundwater due to mining operations in the area. He reviewed the permitted mine areas in Emery County and showed pictures of springs and reservoirs that have suffered as a result of the mining.

Mr. Craig Johansen, Emery Water Conservancy District, discussed the use of water that is saved by conservation. Emery County would like to develop a way to take the water that is conserved and utilize it in the area from which it came for either industrial expansion or other uses rather than letting it go down the Colorado River into Nevada and California.

Sen. Dmitrich stressed the need for a joint effort between the Department of Environmental Quality and the Division of Oil, Gas and Mining to address the problem and develop a solution.

**2. Discussion of Beneficial Use**

Rep. Gowans expressed his concern with how conservation and instream flow relate to beneficial use. He felt the policy on beneficial use should be discussed.

Mr. Jerry Olds, State Engineer, responded to the comments made by the representatives from Emery County. He acknowledged that the mining activity is having a serious effect on the hydrology in that area. He noted, however, that existing case law indicates that it is not the state engineer's prerogative to tell a mining company it can't mine because it is interfering with someone else's water right. He noted the company is responsible to provide replacement water under mining law.

Mr. Olds distributed "Discussion of Beneficial Use of Water" and reviewed statutes within the code that address beneficial use. According to state law, all waters in the state are the property of the public. Water users should avoid waste, speculation, or water hoarding in excess of what is absolutely necessary to fulfill the beneficial uses under a water right. The private use of water must provide some recognized public benefit. Some uses could be considered more beneficial than others as the state engineer evaluates competing applications.

Rep. Dayton asked whose job it is to define which water use is more important than another. Mr. Olds believed the current code is not a ranking. In considering applications, it can be determined whether it potentially would interfere with a more beneficial use of the water. He stated that although rare, instances with competing interests would be determined by the state engineer.

Mr. Olds outlined the types of water uses allowed in water right applications and the types of beneficial uses that are restricted. He stated that quantifying the water requirement for different beneficial uses can be very subjective. He discussed what constitutes a beneficial use.

Rep. Ferry asked Mr. Olds to expand on the definition of "more beneficial use." Mr. Olds explained that the definition is subjective and should be considered on a case by case basis.

Rep. Dayton commented that the state should encourage and reward conservation. She asked if a water right is considered private property and whether the state engineer has authority to tell the water right holder how to use the water.

Mr. Olds responded that applications filed with the state engineer's office are evaluated and approved for certain uses. He said his office operates within the guidelines and framework set by the Legislature.

Rep. Dayton expressed respect for Mr. Olds and for the job he does. She stated that her concerns are with a state engineer in the future who has a bias or assumes more power than intended by the Legislature. She asked Mr. Olds for his definition of instream flow.

Mr. Olds stated instream flow is where the water is not diverted and left in the stream to provide for resource values associated with that stream.

Rep. Ure asked if there is a consumptive use of instream flow other than evaporation. Mr. Olds said they consider instream flow to be a nonconsumptive water right.

Rep. Gowans expressed concern that cities are shopping for water but not utilizing it.

Mr. Olds stated he did not believe municipalities or special service districts are exempt from the beneficial use requirement. The area in which they are given some preferential treatment is on extensions of time.

Mr. Jim Garside, President, Big Ditch Irrigation Company, commented that transitioning water from agriculture to M&I creates a 70 percent cut on paper. He stressed the need to be lenient on shareholders and on the beneficial use of water. He felt the state engineer needs the statutory authority to deny all, or in part, nonuse extension applications filed by public water providers who hold water for monopoly. He

expressed concern that some of the oldest and most dense water claims in Utah have not yet been adjudicated. He advocated additional staff for the Division of Water Rights.

Mr. Todd Bingham, Utah Farm Bureau, said the bureau's policy defines beneficial use for irrigated agriculture as the consumptive use of that water plus the reasonable and necessary losses to distribute it. He encouraged caution when considering conservation. He stated that in some areas, pivots and sprinkler irrigation is wise. However, in other areas it may be detrimental to the overall water system.

Mr. Warren Peterson, Waddingham & Peterson, disagreed with the transition analysis offered by Mr. Garside. He agreed with the need for additional staff in the state engineer's office. Mr. Peterson pointed out that those in the lower reaches of rivers live on return flow. Return flow creates efficiencies on a riverwide system. The Sevier River has been determined to be the most efficient water system in terms of productive use in the world.

Rep. Dayton asked Mr. Peterson for his definition of return flow. Mr. Peterson responded that return flow is water that returns to the hydrologic system after it has been applied.

**MOTION:** Sen. Arent moved to change the order of the agenda as follows: discussion of Item 5, 6, 3, and 4. The motion passed unanimously.

### **3. Nonprofit Corporation Amendments**

Mr. Parker briefly reviewed 2007 General Session draft legislation, "Nonprofit Corporation Amendments." The bill addresses voting requirements for nonprofit corporations and authorizes distributions from one nonprofit corporation to another upon dissolution. The bill prevents the automatic transfer of title in water rights upon dissolution of a nonprofit corporation and exempts nonprofit corporations from the effects of Title 61, Chapter 6, Control Shares Acquisition Act.

Rep. Painter questioned if a company asks a shareholder to give up his voting rights if his share comes under a new change application, will the bill disallow the one share one vote provision. Mr. Parker said there would have to be a provision for that in the Articles of Incorporation.

Rep. Ferry stated there is a difference between a proxy vote and a requirement to forego voting rights in exchange for a change application. He said it is not proper for a board to require forfeiture of a shareholder's voting right for the approval of a change application.

Mr. Peterson stated the bill does not address that situation.

Mr. Garside stated that when a company dissolves, the water rights should revert back to the shareholders without the interference of the corporation that is dissolving. He indicated that board meetings of nonprofit corporations need to be open to all shareholders.

Mr. Parker stated if the company ceases to carry on its duties, the user could petition to get the water right back. Until that happens, the company is able to transfer it to another corporation for the purpose of carrying on the enterprise.

Mr. Fred Finlinson, Coalition (Utah Water Coalition), distributed a memorandum outlining recommendations on the draft legislation being considered by the Task Force. He stated the Coalition supports the legislation.

**MOTION:** Rep. Painter moved to adopt the legislation with the following amendment: on line 106 delete "dissolutions" and insert "dissolution." The motion passed unanimously. Rep. Dayton was absent for the vote.

#### **4. State Declaration of State Water Week**

Rep. Ralph Becker discussed 2007 General Session draft legislation, "State Declaration of State Water Week." The bill would declare the first full week of May to be State Water Week. It would provide an opportunity to help educate and inform citizens of the state about critical water issues.

Ms. Ann Erickson, Drinking Water Board, indicated that loan applications for drinking water districts require conservation plans to be in place.

**MOTION:** Sen. Arent moved to adopt the legislation as a task force bill. The motion passed unanimously. Rep. Dayton was absent for the vote.

Ms. Stephanie Duer, Water Conservation Coordinator, Salt Lake City Department of Public Utilities, said most of the money for the events held last year was raised through organizations that participated and donations and contributions from businesses. She hoped the legislation would facilitate a public and private sector effort at educating all areas of the state about water issues.

#### **5. Instream Flow to Protect Trout Habitat**

Ms. Brown reviewed the changes that had been made to 2007 General Session draft legislation, "Instream Flow to Protect Trout Habitat" since the last meeting. She distributed and reviewed some alternative language in amendment form by Sen. Hatch. She addressed the issue of who would have discretion to approve applications requested. The biological checkoff is with the Division of Wildlife Resources. If there is to be discretion in the process, Ms. Brown said vesting it with the state engineer would be consistent with Title 73.

Chair Ure distributed his proposed amendment to the bill.

Mr. Olds requested that the Task Force be as specific as possible regarding criteria on instream flow that it wants the state engineer to consider.

Ms. Brown reviewed the amendment proposed by Rep. Ure and continued with discussion of the bill.

The Task Force discussed the amendment recommended by the Coalition which is as follows: on line 398, after "change application" insert "which may not be further upstream than the original point of diversion or further down stream than the next physical point of diversion used by a non applicant."

**MOTION:** Rep. Ferry moved to adopt the language provided by the Coalition. Staff counsel will modify

it and place it in the bill where appropriate. The motion passed unanimously. Rep. Dayton, Rep. Morley, and Rep. Painter were absent for the vote.

Chair Ure asked that staff work with Mr. Tim Hawkes, Trout Unlimited, on the necessary language for his amendment.

Mr. Finlinson referred to the list of alternative language supplied by staff. He cautioned against creating one set of criteria for change applications for just instream flow.

**MOTION:** Rep. Ferry moved to adopt the language as written on line 376 and lines 381 and 382. The motion passed unanimously. Rep. Dayton was absent for the vote.

Mr. Jim Karpowitz, Division of Wildlife Resources, said he believed the concept of the bill would help prevent the listing of several sensitive species as endangered and would secure water where needed to help protect those species.

Mr. Carly Burton, Utah Water Users Association, requested that they be allowed time at the next meeting to discuss philosophical and unresolved issues concerning instream flow legislation.

Mr. Mike Peterson, Utah Rural Electric Association, asked the Task Force to consider the impact the legislation would have on hydroelectric generation.

Mr. Rick Danver, Deseret Land and Livestock, expressed support for the approach that has been taken with the legislation.

Mr. Kim Christy, State and Institutional Trust Lands Administration, asked that the Task Force consider adding the agency to the list of entities that can hold instream flow rights since next to the federal government, they are the largest landowner in the state.

## **6. Instream Flow to Preserve Water Quality**

Ms. Brown reviewed the changes that had been made to 2007 General Session draft legislation, "Instream flow to Preserve Water Quality (Option A)."

Rep. Ferry asked if it would be appropriate to adopt the same language regarding the source and point of diversion that was adopted in the trout habitat bill.

Mr. Finlinson explained that POTW (privately owned treatment works) use is generally much lower in the watershed than the use of the reach for the native trout species.

Chair Ure asked Mr. Olds how he protects someone who might have a diversion point within the flow stream of the POTWs.

Mr. Olds indicated there will be requirements with the implementation of the legislation to make sure they are able to manage it on a day to day basis.

Chair Ure asked Mr. Olds if he had the fiscal means to regulate this legislation at the present time. Mr. Olds stated they would handle it through the river commissioners. He said he would try to pass along the majority of the cost to the water user utilizing the service. However, he did not yet know if additional staff time would be required.

Mr. Jerry Kinghorn, Parsons Kinghorn Harris, said the proposed legislation is restricted to the change for an instream flow being limited to the consumptive portion of the water right. He said they are trying to protect the return flow rights of everyone below the original point of diversion. Safeguards have been included in the bill. A stabilized streamflow is part of permanent treatment plant operations. He noted that there is a benefit to the public to have these treatment plants in place.

Ms. Brown reviewed 2007 General Session draft legislation, "Instream Flow to Preserve Water Quality (Option B)" that contains the changes made in Option A and the trout habitat bill as applicable. The amendments provided by Rep. Ferry at the last meeting have also been incorporated into the bill.

**MOTION:** Rep. Ferry moved to delete lines 539-541 in Option B and renumber accordingly. The motion passed unanimously. Rep. Dayton was absent for the vote.

Rep. Ferry explained that the purpose of Option B is to provide POTWs the opportunity to meet water quality standards with temporary water for a temporary period of time in order to bring their facilities on line and comply with federal and state regulations without depending on instream flows. He felt Option A crosses the line of what is in the best interest of the public.

Rep. Morley questioned if the legislation would put POTWs in a position of competing with drinking water for senior water rights in order to keep these flows.

Mr. Kinghorn said there is no place in the state where there will be competition for instream flows between a drinking water source and the receiving water for a treatment plant discharge.

## **7. Other Items / Adjourn**

The next meeting was scheduled for November 16 at 9:00 a.m.

**MOTION:** Rep. Painter moved to adjourn the meeting. The motion passed unanimously. Rep. Dayton was absent for the vote.

Chair Ure adjourned the meeting at 12:15 p.m.